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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 737

HOMER C. ZINK, Comptroller of the Treasury of New Jersey, et al,

Petitioner and Respondent-Appellee below,

vs.

CITY OF JERSEY CITY, a municipal corporation of New Jersey, et al,

Respondents and Relators-Appellants below.

On Petition for Certiorari to the Court of Errors and Appeals of New Jersey.

BRIEF ON BEHALF OF THE CITY OF JERSEY CITY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Statement of the Case.

In July, 1944, there was paid into the treasury of the State of New Jersey by certain railroad company taxpayers the sum of $15,276,373.93 (T., p. 51, l. 31), representing statutory interest on unpaid taxes assessed against them by the State of New Jersey for the years 1932 to 1940, inclusive. The City of Jersey City and certain other municipalities in New

Jersey, statutory distributees of a part of the taxes, made demand upon the petitioner herein, Homer C. Zink, Comptroller of the Treasury of New Jersey, to issue his warrant upon the State Treasury for the distribution of $8,076,047.60 of such collected tax interest to them, asserting that it was his ministerial statutory duty so to do under New Jersey R. S. 54:24-11 and 54:24-13. The said Zink refused so to do on the ground that he did not construe the said statute to constitute an appropriation to such municipalities of interest on railroad tax arrears.

Early in 1945 the New Jersey Legislature enacted Chapters 4, 5, 6 and 34 of the Laws of 1945, under which the municipalities of the state to which railroad taxes were distributable would have been entitled only to $3,301,539.94 of the aforementioned sum of interest, as interest, (T., p. 101, Column (A)), the remainder being made distributable for miscellaneous other state and local purposes. Thereupon, the City of Jersey City and certain other municipalities, together with individual taxpayers in said municipalities, applied to the New Jersey Supreme Court for a writ of mandamus, commanding the said Zink, as State Comptroller, to distribute the aforementioned $8,076,047.60 to the municipalities entitled thereto, as required by R. S. 54:24-11 and 54:24-13, asserting that the 1945 laws were in contravention of the Constitution of the State of New Jersey, as special and local legislation, violative of Article IV, Section 7, Paragraph 11 thereof. The New Jersey Supreme Court entered judgment denying the application (T., p. 143). *Jersey City* v. *Zink*, 132 N. J. L. 601.

Upon appeal by the City of Jersey City and the other applicants for the writ to the New Jersey Court of Errors and Appeals, the judgment of the Supreme Court was reversed and judgment of mandamus ordered entered, com-

manding the Comptroller forthwith to make the distribution requested. The opinion of the New Jersey Court of Errors and Appeals is summarized by it in its own syllabus, *Jersey City* v. *Zink*, 133 N. J. L. 437, which reads as follows:

> "1. *Mandamus* is the proper remedy to compel a state officer to perform a ministerial duty.
>
> "2. Such a proceeding is not a suit against the state.
>
> "3. Under R. S. 54:27-4, as construed in *Wilentz* v. *Hendrickson*, 135 N. J. Eq. 244, the interest for delinquency in tax payments follows the principal as an integral part thereof, constituting the tax debt and is distributable under R. S. 54:24-11 and 13.
>
> "4. Chapters 4, 5, 6 and 34, Pamph. L. 1945, *held* unconstitutional, being discriminatory and special enactments regulating the internal affairs of towns and counties in violation of article IV, section 7, paragraph 11 of the state constitution."

Thereupon, petitioner Zink filed a petition with the Court of Errors and Appeals for a rehearing, alleging, for the first time, that the determination of the Court constituted a denial to the State of New Jersey of a republican form of government as guaranteed to the several states by Article IV, Section 4, of the United States Constitution. The petition for rehearing was denied by the Court of Errors and Appeals on January 3, 1946. The remittitur of the court has been stayed pending disposition of the present application.

Summary of Argument.

I. There is no jurisdiction in this Court under Section 237 of the Judicial Code to review the judgment of the New Jersey Court of Errors and Appeals by certiorari, no federal question having been raised below.

II. No federal constitutional right is asserted by the petitioner.

III. The assertion of rights under Article IV, Section 4, of the United States Constitution is an improper basis for an application for certiorari to review the judgment of the highest court of the state.

IV. The petitioner Zink asserts no personal, as distinguished from official, rights which can warrant his invocation of review by this Court of the judgment of the New Jersey Court of Errors and Appeals.

Argument.

I.

There is no jurisdiction in this court under Section 237 of the Judicial Code to review the judgment of the New Jersey Court of Errors and Appeals by certiorari, no federal question having been raised below.

Petitioner assigns Section 237 of the Judicial Code (28 U. S. C. A. 344(b)) as the jurisdictional basis for the review sought herein (Petition, p. 5). He asserts that that section confers jurisdiction by certiorari in that "certain rights, privileges and immunities afforded to the State of New Jersey by virtue of Article IV, Section 4, of the United States Constitution, have been abridged by the New Jersey Court of Errors and Appeals. * * *" (*Id.*). He concedes no federal question was raised in the cause below other than in the petition for rehearing after the judgment below was entered. In such case Judicial Code, Section 237(b), does not, on its face, apply to confer jurisdiction upon this Court. The statute permits the issuance of certiorari by this Court only—

> "* * * in a cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. . . ."

No federal claim having been presented to the New Jersey courts at any point in the proceedings below, Section 237(b) is, by its express provisions, not applicable to confer jurisdiction upon this Court.

The United States Supreme Court has held that these provisions mean exactly what they say, and that where no federal question has been raised in a state court litigation, the Supreme Court is absolutely without jurisdiction.

Hulbert v. *Chicago*, 202 U. S. 75;
Cox v. *Texas*, 202 U. S. 446;
Adams v. *Russell*, 229 U. S. 353.

Petitioner's attempt to overcome this difficulty upon the ground that he could not foresee the impairment of the alleged federal constitutional right until the Court of Errors and Appeals had rendered its decision, is both immaterial and unfounded. Petitioner's assertion that rights of the State of New Jersey under Article IV, Paragraph 4, of the United States Constitution have been infringed, is based upon the allegation that the New Jersey court, in effect, held that the State of New Jersey could be sued without its consent and that the court might assume to appropriate moneys of the State of New Jersey in the place of the legislature. (The syllabus of the opinion of the court, and the opinion itself, plainly shows that the court held neither of these propositions). But petitioner well knew he had raised before the New Jersey courts the contentions that an allowance of the writ would constitute both the entertainment of a suit against the state without its consent, and the distribution of moneys out of the state treasury not appropriated by the state legislature. He also knew that the applicants for the writ of mandamus were contending that their application was not a suit against the

state, but merely the appropriate remedy to compel a state officer to perform a ministerial duty, and that the legislature of New Jersey had appropriated the railroad tax interest moneys to the municipalities under R. S. 54:24-11 and 13. He certainly cannot now be heard to say that he could not contemplate the possibility of the Court resolving those issues in favor of the applicants for the writ and against himself, as respondent below, and yet, that is the absurd position here taken.

The alleged federal question now raised was obviously an after-thought of the petitioner, conceived solely for the purpose of continuing the litigation below in this Court.

It appears, moreover, that, petitioner does not even now raise the precise federal question presented by him in the application for rehearing to the New Jersey Court of Errors and Appeals. There he urged that the decision of the Court *denied* to New Jersey a republican form of government, guaranteed by the United States to the several states by Article IV, Section 4 of the United States Constitution. Here, on the contrary, as fully shown in the next Point herein, he expressly disclaims that position and argues, instead, that the decision below is "an interference with the orderly working of an *existing republican form of government* * * *" (Petition, pp. 2, 5). That particular contention was never made below at any time whatever, even in the petition for rehearing.

No federal question having been raised in the litigation below, Section 237 of the Judicial Code, as heretofore repeatedly construed by this Court, affords no jurisdiction for the issuance of the writ of certiorari requested.

II.

No Federal Constitutional right is asserted by the petitioner.

The petition herein refers to Article IV, Section 4, of the Constitution of the United States, as the basis for the present application (Petition, p. 4). That provision reads as follows:

> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; * * *."

But petitioner now, contrary to the express position taken by him in the petition for rehearing before the Court of Errors and Appeals, expressly disclaims the position that the action of the New Jersey Court of Errors and Appeals constitutes a denial of the republican *form* of government to New Jersey (Petition, p. 5). He here asserts that he does not contend that there has been a denial of the republican form of government, but that "the present review is asked in support of an existing republican form of government" (Petition, p. 2), and that the alleged unconstitutional action of the New Jersey court is "an interference with the orderly working of an existing republican form of government * * *."

Article IV, Section 4 guarantees the *existence* of a republican *form* of government to each of the states, not the "orderly working" thereof. Since Article IV, Section 4, of the United States Constitution is the only federal constitutional or statutory provision adduced by petitioner as the basis for his claim of impairment of a federal right, and since he expressly concedes that the State of New

Jersey continues to enjoy a republican form of government, notwithstanding the asserted objectionable decision of the New Jersey Court of Errors and Appeals, the petition necessarily presents nothing which is cognizable by this Court as a basis for review of the judgment of the highest court of New Jersey.

III.

The assertion of rights under Article IV, Section 4, of the United States Constitution is an improper basis for an application for certiorari to review the judgment of the highest Court of the state.

If, despite the express disclaimer by petitioner of any denial of the republican form of government in New Jersey by the decision complained of, it could nevertheless be considered that in some vague way petitioner is invoking the provisions of Article IV, Section 4, as the basis for the present application, a writ could nevertheless not issue. It is thoroughly and incontestibly laid down by the decisions of this Court that the Court has no jurisdiction to adjudicate that state action of any nature violates the federal constitutional guaranty to the states of a republican form of government. As is recognized by petitioner, it is now settled beyond question that the guaranty by the United States to the several states of a republican form of government, under Article IV, Section 4, is for enforcement exclusively by Congress and not the courts. The rule was restated by Mr. Justice Cardozo in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, where a state statute was attacked as violative of the guaranty. In stating that the United States Supreme Court had no jurisdiction to entertain the controversy, the Court said (p. 612):

"How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself. Nothing in the distribution here attempted supplies the basis for an exception. The statute is not a denial of a republican form of government. Constitution, Art. 4, Sec. 4. Even if it were, the enforcement of that guaranty, according to the settled doctrine, is for Congress, not the courts. Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 S. Ct. 224; Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565, 60 L. ed. 1172, 36 S. Ct. 708; Ohio ex rel. Bryant v. Akron Metropolitan Park Dist., 281 U. S. 74, 79, 80, 74 L. ed. 710, 715, 716, 50 S. Ct. 228, 66 A. L. R. 1460."

The question as to whether the guaranty has been violated by state action in a particular case has been specifically held not to constitute a judicial question, but only a political question committed solely to the Congress of the United States. In *Mountain Timber Co.* v. *Washington*, 243 U. S. 218, 234, the Court said:

"Two of the constitutional objections may be disposed of briefly. It is urged that the law violates Sec. 4 of article 4 of the Constitution of the United States, guaranteeing to every state in the Union a republican form of government. As has been decided repeatedly, the question whether this guaranty has been violated *is not a judicial but a political question*, committed to Congress, and not to the courts. Luther v. Borden, 7 How. 1, 39, 42, 12 L. ed. 581, 597, 599; Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; Kiernan v. Portland, 223 U. S. 151, 56 L. ed. 377, 32 Sup. Ct. Rep. 231; Marshall v. Dye, 231 U. S. 250, 256, L. ed. 206, 207, 34 Sup. Ct. Rep. 92; Ohio ex rel. Davis v. Hildebrandt, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708."

The attempted escape from this rule asserted in the petition, that here the impairment of the "orderly working" of a republican form of government is by state court, rather than state legislative action, is patently frivolous. What possible difference can it make, if the guaranty is a political one, committed solely to Congress for enforcement and not to the courts, whether the state action complained of is by the judiciary rather than the legislature?

That the negation of jurisdiction in the United States Supreme Court, under Article IV, Section 4, is not confined to cases of objection to actions of a state legislature, is indicated by the case of *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74, where the same rule as stated above was applied where the contention was that a state constitutional provision constituted a deprivation of the republican form of government in a state. The state constitutional provision there in question provided that "no law shall be held unconstitutional and void by the Supreme Court without the concurrence by at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void." The United States Supreme Court held:

> "As to the guaranty to every state of a republican form of government (sec. 4, art. 4), it is well settled that the questions arising under it are political, not judicial, in character and thus are for the consideration of the Congress, and not the courts. Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; O'Neill v. Leamer, 239 U. S. 244, 248, 60 L. ed. 249, 263, 36 Sup. Ct. Rep. 54; Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708; Mountain Timber Co. v. Washington, 243 U. S. 219, 234, 61 L. ed. 685, 694, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917 D, 642, 13 N. C. C. A. 927."

The reason for the non-existence of any United States Supreme Court decision applying the rule in the case of a claimed assertion that the action of a state court impairs the republican form of government is undoubtedly because no one hitherto has thought such a contention even worthy of submission before the United States Supreme Court.

In view of the foregoing, it is quite unnecessary to make the point that the decision of the New Jersey court, on the record before it, is not, in the remotest sense, either the denial of a republican form of government or an impairment of the "orderly working" thereof.

Article IV, Section 4, of the United States Constitution not affording any warrant whatever for action by this Court, and that provision of the Constitution being the only one even adverted to in the petition or supporting brief, the application for certiorari should be denied.

IV.

The petitioner, Zink, has no personal, as distinguished from official, rights which can warrant his invocation of review by this Court of the judgment of the New Jersey Court of Errors and Appeals.

It is settled by prior decisions of this Court that among the limitations upon the right of this Court to review the judgment of the highest court of a state under Section 237 of the Judicial Code is the principle which requires those who seek such review "to have a personal, as distinguished from an official, interest in the relief sought and in the Federal right alleged to be denied by the judgment of the state court."

Smith v. *Indiana,* 191 U. S. 138;
Braxton County Court v. *West Virginia,* 208 U. S. 192;
Clark v. *Kansas City,* 176 U. S. 114;
Marshall v. *Dye,* 231 U. S. 250.

The judgment of the New Jersey Court of Errors and Appeals here sought to be reviewed is directed against the petitioner, Homer C. Zink, as Comptroller of the Treasury of New Jersey. He is therefore affected solely in his official, and not in his personal capacity. The application herein must, if for that reason alone, therefore, be denied.

The contention in the brief of petitioner that he is appearing as the *alter ego* for the State of New Jersey obviously begs the question as to whether the New Jersey statute, properly construed, did not impose upon him a mere ministerial duty to distribute certain moneys in the state treasury to various political subdivisions of the state. If it did, then,

under both state and federal decisions, the proceeding below was not an action against the state.

Haycock v. *Jannarone,* 99 N. J. L. 183;
Sommer v. *State Highway Commission,* 106 N. J. L. 26;
Empire Trust Co. v. *Board of Commerce & Navigation,* 124 N. J. L. 406, 410;
Board of Liquidation, et al v. *McComb,* 92 U. S. 531, 541;
Ex Parte Young, 209 U. S. 123;
Houston v. *Ormes,* 252 U. S. 469.

The New Jersey Court of Errors and Appeals has determined that the New Jersey statutes, properly construed, call for the exercise by the State Comptroller of the ministerial function of distribution of the moneys here in question to certain municipalities. The construction of the New Jersey statutes by the highest court of the state is, of course, conclusive upon this Court. It therefore follows that, for purposes of this application, petitioner must be considered to have been under a ministerial duty, in his official capacity, to take the action enjoined upon him by the judgment of the New Jersey court below. Therefore, his status, both in the court below and here, must be deemed as in his official capacity as Comptroller of the State of New Jersey, and neither as *alter ego* for the State of New Jersey, nor in his personal capacity. The State of New Jersey is not the petitioner here, directly or indirectly.

Under the decisions of this Court cited hereinabove, no review of the state court judgment can issue out of this Court upon the application of petitioner in such official capacity.

Conclusion.

It is, accordingly, respectfully submitted that the application for a writ of certiorari be denied.

Respectfully submitted,

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